

Honorable Richard A. Jones
Honorable Michelle L. Peterson

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILD FISH CONSERVANCY,
Plaintiff.

SCOTT RUMSEY, in his official capacity as
Acting Regional Administrator for the National
Marine Fisheries Service, *et al.*,

Defendants,

and

ALASKA TROLLERS ASSOCIATION and
STATE OF ALASKA,

Defendant-Intervenors.

CASE NO: 2:20-cv-00417-RAJ-MLP

STATE OF ALASKA'S RESPONSE TO OBJECTIONS TO THE COURT'S REPORT AND RECOMMENDATION

Noting Date: January 27, 2023

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I. INTRODUCTION

The vacatur recommended in the Magistrate Judge’s Report and Recommendation regarding remedy, Dkt. 144 (“R&R”), is not narrow, moderate, or reasonable. It is a radical remedy that would have far-reaching impacts to the social and economic fabric of coastal communities in Southeast Alaska and would decimate the lives of thousands of Alaskans who rely on the related Chinook troll fisheries, all for no additional benefit to the Southern Resident Killer Whale (“SRKW”) population. Defendant-Intervenor State of Alaska (“State” or “Alaska”) implores the Court to reject the R&R and instead remand the matter without vacatur, adopting a remedy that keeps in place the incidental take protections of the 2019 Southeast Alaska Biological Opinion (“2019 SEAK BiOp”), consistent with the requirements under the Pacific Salmon Treaty, while the National Marine Fisheries Service (“NMFS”) finishes the revised analyses it has already begun under the Endangered Species Act (“ESA”) and National Environmental Policy Act (“NEPA”).

II. ARGUMENT

A. Vacatur of the 2019 SEAK BiOp's ITS is Not Narrow.

In its objections to the R&R, Plaintiff Wild Fish Conservancy (“Plaintiff”) makes the facially absurd argument that “the R&R has carefully recommended a narrow partial vacatur of the 2019 SEAK BiOp’s incidental take statement (“ITS”)...” Dkt. 151 at 6. A proposed remedy that would destroy an industry and decimate coastal communities in Southeast Alaska is not narrow, it is radical. The Magistrate Judge agreed with the State on this point at oral argument, where the following colloquy took place:

MR. PETERSON: The Pacific Salmon Treaty is one of the three things that I want to talk about here, briefly. The first thing that I'll talk about is, the relief requested is not a narrow, moderate, or reasonable request. It's radical.

THE COURT: Yeah, no, I agree with you.

MR. PETERSON: Okay. We're talking about closing a fishery. I won't -- I mean, it's been talked about a little bit by the Trollers, by NMFS. It's critically important to the

1 communities in Southeast Alaska that rely on these fisheries.

2 Transcript of Motion Hearing at 54.

3 The Magistrate Judge who issued the R&R plainly agreed that the relief sought by the
 4 Plaintiff is not “narrow, moderate, or reasonable,” but rather is “radical.” To categorize the
 5 vacatur recommended in the R&R as a “narrow partial vacatur” is simply against the weight of
 6 the available facts. It would also be cold comfort to the thousands of Alaskans whose
 7 livelihoods would be destroyed that the shuttering of their fisheries is viewed as narrow or
 8 surgical.

9 **B. The Prey Increase Program Mitigates Any Impacts from the SEAK
 10 Fisheries.**

11 As both the State and Defendant-Intervenor Alaska Trollers Association have noted, the
 12 R&R fails to address NMFS’s analysis in the 2019 SEAK BiOp that the prey increase program
 13 would mitigate the impacts of the Southeast Alaska fisheries. *See* Dkt. 147 at 6; Dkt. 148 at 2-3.
 14 NMFS developed the prey increase program as a mitigation measure specifically to account for
 15 the SEAK fisheries. Here again, the R&R is illogical. If the Court leaves the prey increase
 16 program intact, then any potential impact from the SEAK fisheries is mitigated, completely
 17 negating any perceived need to shut down the fisheries. But the R&R fails to reach this logical
 18 conclusion from the information in the record.

19 **C. Plaintiff Overstates the Impact of the SEAK Fisheries.**

20 Plaintiff also misses the mark when it argues that the suggested vacatur “would remove
 21 take authorization for only those fisheries that are most harmful to endangered Southern Resident
 22 Killer Whales (“SRKW”) and threatened Chinook salmon....” Dkt. 151 at 6. This is simply not
 23 true. As Ms. Evenson explained in her earlier declaration, the newest and most accurate science
 24 reflects that during the summer months SRKW feed on local stocks of Chinook where reductions
 25 in prey due to the SEAK fishery are estimated at only 1.0%–2.5%. Dkt. 135 ¶ 15. Also, SRKW
 26 are thought to be most limited in prey availability during the winter period, which they spend in
 27 coastal waters, but during those months SEAK troll fisheries were estimated to reduce prey

1 availability in these locales by only 0.2%–1.1%. *Id.* Accordingly, the prey reduction analysis
 2 performed in the 2019 SEAK BiOp vastly overestimates the potential real-world benefits to
 3 SRKW from restricting the SEAK troll fishery. It is simply not true that the SEAK fisheries in
 4 question are the “most harmful to the” SRKW.

5 **D. Vacatur of the ITS Will Result in Economic Calamity for Southeast Alaska.**

6 While the limited potential for prey reduction that might be achieved through the remedy
 7 proposed in the R&R is highly speculative, the absolute certainty of economic calamity for
 8 Southeast Alaska from that remedy is crystal clear. As the State laid out in detail in its Response
 9 to Plaintiff’s Motion for a Final Order on Remedy, Dkt. 134, the impacts of shuttering the SEAK
 10 troll fishery would severely hamper Southeast Alaska’s economy.

11 The R&R superficially discusses economic impacts, noting Plaintiff’s estimated
 12 “economic impact of around \$9.5 million loss in generated annual income in the winter and
 13 summer seasons” and the federal defendant’s “estimate that the annual economic output of the
 14 Chinook salmon commercial troll fleet for the winter and summer seasons fishery to be
 15 approximately \$29 million.” Dkt. 144 at 30. However, the R&R ignores the true extent of the
 16 potential impact, simply concluding that “[s]everal Southeast Alaska communities would also be
 17 impacted given their economic reliance on the commercial troll fishery seasons for income, the
 18 loss of tax revenue to these communities, and because of existing cost barriers to entry into other
 19 salmon fisheries.” *Id.* As the State has consistently detailed, the impact of closing the fishery
 20 would economically devastate Southeast Alaska. *See* Dkt. 134, Dkt. 148.

21 The effects of closure of the fishery would be felt across the region. A substantial portion
 22 of the population of many of the smaller communities in Southeast Alaska, like Elfin Cove,
 23 Meyers Chuck, Pelican, and Point Baker, would lose the primary source of their income. *See*
 24 Second Declaration of Vincent-Lang, Dkt. 136 ¶ 4. The effects of closure would be felt as well
 25 in larger towns, like Sitka, where the troll fishery brings in over eight million “ex-vessel” dollars
 26 per year—a hugely significant number for a town with only 8,000 residents. *Id.* ¶ 5. Closure of
 27 the winter and summer Chinook troll fisheries could reduce the earning potential of a troll permit
 28

1 by anywhere from a third to a half, most likely rendering it no longer financially feasible for
 2 many fishers to participate. *Id.*

3 In addition to the direct impacts to troll permit holders, fishery closure would also impact
 4 overall economic activity in the State through a chilling effect on the handling, processing,
 5 wholesaling, and retailing of Chinook salmon. *Id.* ¶ 6. It would also lead to reduced fishery
 6 resource landing tax revenue—which provides for schools, utilities, and harbor maintenance—
 7 for the State and for municipalities. *Id.* ¶ 7. In some communities, the economic domino effect
 8 could reach a tipping point where there are no longer sufficient children of school age to allow
 9 the schools to keep state funding, which typically results in the closure of schools. *Id.* ¶ 4.

10 The importance of these fisheries to Southeast Alaska cannot be overstated—and
 11 vacating the ITS, thereby effectively closing the Chinook troll fishery, would decimate the
 12 region both socially and economically.

13 **E. Vacating the Prey Increase Program Will Have Cascading Effects.**

14 Plaintiff objects to the R&R because that report does not recommend vacatur and
 15 injunction of the Prey Increase Program. *See* Dkt. 151. Beyond the fact that Plaintiff has not
 16 made the requisite showing for a permanent injunction, the Court should not enjoin the prey
 17 increase program because of the impact such an injunction would have outside of Southeast
 18 Alaska, most notably on Puget Sound and Pacific Fishery Management Council (“PFMC”)
 19 salmon fishery BiOps and other Pacific Northwest fishery management plans.

20 Recall that NMFS required a mitigation program in the 2019 SEAK BiOp to support a no
 21 jeopardy finding for the SEAK salmon fisheries and for PFMC-managed fisheries and Puget
 22 Sound fisheries. Dkt. 135 ¶ 8. Enjoining the SRKW prey increase program until the Court
 23 enters its final order on relief as requested in the Plaintiff’s motion would likely have cascading
 24 impacts to commercial and recreational fisheries off the coasts of Washington and Oregon, in
 25 Puget Sound, and in other areas. *Id.* ¶ 9. The BiOps and management plans for PFMC and
 26 Puget Sound commercial and recreational fisheries rely on the increased hatchery production
 27 from this mitigation action to stay above a Chinook abundance threshold to limit the effects that

1 the fisheries have on SRKWs by way of reduced prey availability and accessibility in years when
2 Chinook abundance is particularly low. *Id.* Enjoining the prey production program would
3 increase the likelihood that Chinook abundances would fall below thresholds specified in the
4 PFMC BiOp, resulting in additional limits to those commercial and recreational fisheries and in
5 Puget Sound. *Id.* For these reasons, the Court should not enjoin NMFS's prey increase program.

6 III. CONCLUSION

7 For all of these reasons, the State respectfully requests that the Court reject the R&R and,
8 instead, remand the matter back to NMFS without vacatur of the ITS, allowing NMFS to finish
9 the updated ESA and NEPA analyses it has already begun and expects to finish by November
10 2024.

11 Dated: January 24, 2023

12 NOSSAMAN LLP
13 BRIAN FERRASCI-O'MALLEY
14 By: /s/Brian Ferrasci-O'Malley
15 Brian Ferrasci-O'Malley, WSBA #46721
719 Second Avenue, Suite 1200
Seattle, WA 98104
Tel: 206.395.7622
bferrasciomalley@nossaman.com

16 TREG R. TAYLOR
17 ATTORNEY GENERAL
18 By: /s/Aaron C. Peterson
19 Aaron C. Peterson, Alaska Bar No. 1011087
Senior Assistant Attorney General
Department of Law
20 1031 West Fourth Avenue, Ste. 200
Anchorage, AK 99501
Tel: 907.269.5232
aaron.peterson@alaska.gov
21 Attorneys for State of Alaska

CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2023, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to all ECF registrants.

/s/ Brian Ferrasci-O'Malley
Brian Ferrasci-O'Malley